

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, LLC,
f/k/a FIBER SYSTEMS, LLC,

v.

VERIZON MA NEW ENGLAND, f/k/a
NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY,

And

NORTHEAST UTILITIES SERVICE COMPANY,
d/b/a WESTERN MASSACHUSETTS
ELECTRIC COMPANY,

And

MASSACHUSETTS ELECTRIC COMPANY.

D.T.E. 03-56

**ATTACHMENTS TO MASSACHUSETTS ELECTRIC COMPANY'S ANSWER
AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**

June 13, 2003

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	1
Attachment A, Complaint in Superior Court.....	2
Attachment B, Application for Preliminary Injunction.....	17
Attachment C, Memorandum of Law in Support of Application for Preliminary Injunction.....	19
Attachment D, Affidavit of Pamela Jo Fournier.....	50
Attachment E, Affidavit of G. Paul Anundson.....	63
Attachment F, Emergency Motion to Consolidate with the Verizon MA and WMECO proceeding.....	121
Attachment G, Consent Order.....	124
Attachment H, Denial of Fibertech Motion to Dismiss MEC complaint.....	129
Attachment I, Denials of Fibertech Motions to Dismiss WMEC and Verizon complaints.....	130
Attachment J, Supplemental Affidavit of G. Paul Anundson.....	133

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPARTMENT
Civil Action No.

02 983

_____)
MASSACHUSETTS ELECTRIC COMPANY,))
Plaintiff,))
v.))
FIBERTECH NETWORKS, LLC, f/k/a))
FIBER SYSTEMS, LLC,))
Defendant.))
_____)

COMPLAINT

I. INTRODUCTION

Plaintiff Massachusetts Electric Company ("MEC") files this Complaint against Defendant Fibertech Networks, L.L.C., f/k/a FiberSystems, LLC ("Fibertech") for injunctive relief, declaratory judgment, breach of contract and violations of Massachusetts General Laws, ch. 166, § 35. Defendant Fibertech has willfully disregarded and violated the terms of its Aerial License Agreement with MEC, which govern the terms and conditions pursuant to which Fibertech may attach certain facilities to poles owned by MEC. Despite the fact that those agreements expressly require Fibertech to obtain written authorization from MEC in the form of a license prior to making any attachments, Fibertech has recently placed over 200 unauthorized attachments on poles solely or jointly owned by MEC in Northhampton, Massachusetts. In addition to violating the terms and conditions of the agreement, in many instances,

Fibertech installed these facilities in a manner that threatens public safety and poses a hazard not only to MEC personnel and facilities, but those of other pole users—such as telephone and telecommunications carriers, and cable television providers.¹

Despite the fact that MEC has repeatedly brought these extensive violations to its attention, to date Fibertech has failed to take any action to cure them. The continued deployment by Fibertech of such unauthorized attachments, and the maintenance of existing ones, not only undermines the established process by which MEC provides nondiscriminatory access to all qualified attachees, but also threatens the continued safe operation of facilities used to provide electric, telecommunication, and cable services. By this action, MEC seeks this Court's assistance in the form of injunctive relief and damages for breach of contract to force Fibertech to remove the unauthorized attachments it has installed on MEC's poles to date, and to prevent Fibertech from making further unauthorized attachments to MEC-owned poles in violation of the terms and conditions of its Aerial License Agreement.

II. PARTIES

1. MEC is a Massachusetts corporation with a principal place of business at 55 Bearfoot Road, Northborough, Massachusetts, 01532. MEC provides electric distribution services in Massachusetts. MEC is registered and conducts business in Massachusetts as "Massachusetts Electric Company."

2. Upon information and belief, Fibertech is a Delaware limited liability company with its principal place of business at 140 Allens Creek Road, Rochester, New York, 14618. Fibertech installs and builds, but does not operate, carrier-ready dark fiber

¹ Fibertech does not itself provide telecommunications services as that term is defined under Section 154(46) of the Telecommunications Act of 1996, 47 U.S.C. §§ 101, *et seq.*

optic networks for use by telecommunications service providers such as competitive local exchange carriers (“CLECs”), long distance carriers, wireless carriers, and Internet service providers.

III. JURISDICTION AND VENUE

3. This Court has original jurisdiction over this matter pursuant to Mass. Gen. L. ch. 212 § 4.

4. Venue is proper pursuant to Mass. Gen. L. ch. 223 § 8 because MEC has a usual place of business in Northampton, Hampden County, Massachusetts.

5. This Court has personal jurisdiction pursuant to Mass. Gen. L. ch. 223A § 3 over the Defendant because Fibertech transacts business in Massachusetts, maintains network facilities within the state of Massachusetts, and contracts to supply services in Massachusetts.

IV. FACTUAL BACKGROUND

6. On or about March 17, 2000, Fibertech (then known as “Fiber Systems, L.L.C.”) and MEC entered into an Aerial License Agreement that set forth the terms and conditions under which Fibertech could be permitted to place and maintain attachments on poles owned by MEC, either solely or jointly with Verizon New England Inc. (“Verizon”), within the City of Worcester, in the Commonwealth of Massachusetts. A true and correct copy of the fully executed Aerial License Agreement dated March 17, 2000 is attached as Exhibit A to the Affidavit of G. Paul Anundson, Esq. filed herewith.

7. On or about July 22, 2000, MEC and Fibertech (then known as “Fiber Systems LLC”) entered into an amendment to the Aerial License Agreement. This amendment expanded the list of municipalities in which Fibertech could be permitted to

place and maintain attachments on telephone poles owned solely by MEC. A true and correct copy of this amendment is attached as Exhibit B to the Affidavit of G. Paul Anundson, Esq. filed herewith.

8. The Aerial License Agreement and the amendment referenced above in paragraphs 6 and 7 (hereinafter collectively referred to as the “Agreement”), contain terms and conditions pursuant to which Fibertech could be permitted to install and maintain attachments² on poles owned either solely by MEC, or jointly by MEC and Verizon New England.

9. Subject to the terms and conditions set forth in the Agreement, MEC agreed “to issue to [Fibertech], revocable, non-exclusive licenses authorizing [Fibertech’s] Attachments to Licensor’s poles.” Agreement, Article 2.1.

10. Under the Agreement, Fibertech was required to comply with a number of conditions prior to placing any attachments. As an initial matter, the Agreement provides that prior to installing any attachments Fibertech was obligated to apply for and have received a license from MEC. Agreement, Article 7.1.

11. Prior to the issuance of any license, the Agreement allows MEC to require that Verizon, Fibertech and/or the Electric Company and any joint user or licensee for each pole for which attachment was requested, conduct a joint field survey to determine the adequacy of the pole to accommodate the attachments and to determine what, if any, “make-ready work” was required to prepare the pole to accommodate the requested

² The Agreement defines the term “attachment” as “[a]ny single wire, cable or suspension strand, including wires or cables lashed to it, or any other hardware, equipment, apparatus, or device, placed on [MEC’s] pole. . .” Agreement, Article 1.2.

attachment, and to provide the basis for estimating the cost of the work. Agreement, Article 8.1.

12. The Agreement mandated that Fibertech's attachments were to be placed and maintained in accordance with the requirements and specifications of the latest editions of the Manual of Construction Procedures, Electric Company Standards, the National Electrical Code, the National Electrical Safety Code, and rules and regulations of the Occupational Safety and Health Act or any governing authority having jurisdiction over the subject matter. Agreement, Article 5.1.

13. If MEC determined, as a result of the joint field survey, that a pole to which Fibertech desired to make an attachment was "inadequate or otherwise needs rearrangement of the existing facilities" to accommodate the requested attachments in accordance with the requirements and specifications described above in paragraph 12, MEC would notify Fibertech of the estimated cost of any make-ready work required to prepare the pole for attachments. Agreement, Article 8.3.

14. Fibertech agreed to pay in advance for the field survey and any required make-ready work and, thereafter, MEC agreed to schedule the make-ready work within its "normal work load schedule." Agreement, Articles 4.2, 8.4 and 8.8.

15. Moreover, MEC reserved the right to refuse to grant a license to Fibertech for attachments to a pole if MEC determined that such pole "may not reasonably be rearranged or replaced to accommodate [Fibertech's] Attachments. Agreement, Article 8.2.

16. In submitting its applications for the requisite licenses, Fibertech must identify any poles to which Fibertech seeks to attach. MEC would then specify the point

of attachment on each of its poles that Fibertech proposed to occupy. If Fibertech subsequently desired to relocate or replace any of its attachments, it was required to obtain specific written authorization from MEC before doing so. Agreement, Articles 8.1, 9.2 and 9.3. Additionally, Fibertech was required to designate a desired priority for completion of the field survey and make-ready work. Agreement, Article 7.3.

17. In addition to obtaining the licenses from Verizon, Fibertech was responsible under the Agreements “for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and/or maintain its Attachment on public and private property at the location of [MEC’s] poles . . . and shall submit to [MEC] evidence of such authority before making attachments on such public and/or private property.” Agreement, Article 6.1. Thus, if Fibertech wanted to deploy its facilities in a particular municipality, Fibertech was required to secure any necessary approvals from that municipality and provide evidence to Verizon that it had received the requisite approvals prior to making any attachments to poles in that municipality.

18. Fibertech also agreed to “comply with . . . all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties hereto under [the Agreement].” Agreement, Article 6.2.

19. The Agreement further obligated Fibertech to construct and maintain, at its own expense, any approved attachments in a safe condition and in a manner acceptable to MEC. Agreement, Article 9.1.

20. MEC reserved the right to make periodic inspections of any part of Fibertech’s attachments on MEC’s poles, and Fibertech agreed to reimburse MEC for the cost of any such inspections. Agreement, Article 11.1.

21. MEC is entitled to terminate the Agreement with Fibertech and all authorizations granted pursuant thereto if Fibertech “shall fail to comply with any of the terms or conditions of th[e] Agreement or default in any of its obligations under th[e] Agreement, or if [Fibertech’s] facilities are maintained or used in violation of any law and [Fibertech] shall fail within thirty (30) days after written notice . . . to correct such default or noncompliance.” Agreement, Article 19.1 (emphasis added).

22. In the event of termination of the Agreement, Fibertech must remove its attachments from MEC’s poles within six months of the date of termination and must submit a plan and schedule for such removal within thirty (30) days of the date of termination. Agreement, Article 19.3.

23. The Agreement further provided that Fibertech’s failure to pay all fees and charges within 30 days after presentment of the bill or on the specified payment date, whichever is later, shall constitute a default under the Agreement. Agreement, Article 3.2 and Appendix I(C).

24. If any of Fibertech’s attachments are found attached to MEC’s poles without a license, MEC, “without prejudice to their other rights or remedies under [the Agreement] (including termination) or otherwise, may impose a charge and require [Fibertech] to submit in writing, within fifteen (15) days after receipt of written notification . . . of the unauthorized attachment, a pole attachment application.” If Fibertech fails to submit the requisite application in a timely manner, Fibertech is obligated to “remove its unauthorized attachment within fifteen (15) days of the final date for submitting the required application, or [MEC] may remove [Fibertech’s] facilities

without liability, and the expense of such removal shall be borne by [Fibertech].”

Agreement, Article 12.1.

25. In late June 2002, MEC discovered that Fibertech placed unauthorized attachments on over 200 poles covered by the Agreement in the City of Northampton, Massachusetts.

26. Many of Fibertech’s unauthorized attachments have been installed improperly and not in compliance with the specifications set forth in the Agreements, giving rise to serious and substantial safety hazards for the public, MEC and Verizon personnel, as well as other pole users including telecommunications service providers and cable television operators.

27. For instance, in placing its attachments, Fibertech did not utilize guying, a metal cable of high-tensile strength that is attached to a pole and anchor rod, or another pole, for the purpose of reducing pole stress caused by the installation of high-tension wires. See Pamela Jo Fournier Affidavit, ¶ 13. Additionally, Fibertech violated the National Electrical Safety Code distance requirements by installing its cables in certain instances within 40 inches (measured vertically) of electrical wires in the supply space, and within 12 inches of cable in the communications space, creating a serious risk of energizing communications lines and posing a potentially life-threatening hazard for technicians working on and around the poles. See Pamela Jo Fournier Affidavit, ¶¶ 11-12. In some instances, Fibertech installed extension arms in a transparent attempt to create the appearance of compliance with the 40-inch vertical distance requirement, but because the extension arms extend horizontally they do not create a 40-inch vertical separation as required by code. Further, Fibertech has “boxed-in” poles by improperly

placing attachments on both sides of poles without the consent of existing joint owners and licensees and in contravention of construction requirements, making pole replacement more difficult and preventing access by other pole users to their facilities. Fibertech has also created “mid-span crossovers” by attaching lines that run both above and below the lines of other users creating further risk of damage to the facilities of other users and increasing the likelihood of causing communications lines to become energized with electricity from the power lines. Fibertech’s mid-span crossovers may cause friction between lines in windy conditions posing the threat of damage to lines, preventing access to lines by other users, and increasing the risk of electrifying communications lines, which could pose a substantial danger as described above. Moreover, Fibertech installed lines to CATV through-bolts, crushing the cable in some instances, and creating a further barrier for CATV technicians to access the CATV cable. Finally, Fibertech placed attachments on old, deteriorated poles that may not safely accommodate the additional loading that results from Fibertech’s high-tension attachments. See Pamela Jo Fournier Affidavit, ¶¶ 11-15. Because of their age and deteriorated condition, the additional load resulting from Fibertech’s unauthorized attachments increase the risk that the poles may collapse threatening the safety of motorists and passers-by and creating an additional risk of damage to the lines and equipment of the joint owners and other users on those poles.

28. As aforesaid, these safety violations threaten (i) the safety and welfare of MEC employees and contractors who work on these poles, (ii) the safety of employees and authorized contractors of other companies that maintain facilities on those poles, such as telecommunications service providers and cable television operators, and (iii) in some cases, the safety and welfare of the general public. The unauthorized attachments

also present a threat to the equipment maintained on those poles by MEC and other companies and potentially threatens the services of MEC and other companies who maintain facilities on those poles, including telephone service.

29. MEC estimates that the cost of the work required to make safe (“make-safe work”) Fibertech’s unauthorized attachments on poles owned solely by MEC will be \$59,000. The estimated cost of MEC’s portion of make-safe work on poles owned jointly by MEC and Verizon is \$66,000. Fournier Affidavit, at ¶ 22.

30. By letter dated July 15, 2002, MEC promptly notified Fibertech of the foregoing unauthorized attachments and demanded that Fibertech take immediate remedial steps. Fibertech has not taken any steps that would bring it into compliance with the Agreements or federal, state and local law. See Anundson Affidavit, ¶¶ 7-9, Exs. C-E.

31. Fibertech’s actions also undermine the procedural requirements by which MEC provides nondiscriminatory access to all qualified attachees as required by the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56 (1996)).

32. Fibertech’s unauthorized attachments to 41 poles located on Route 66 and on Earle Street in Northampton, Massachusetts also interfere with MEC’s obligation to remove those poles at the behest of the Massachusetts Highway Department in preparation for a road project. Additionally, Fibertech’s unauthorized attachments to 7 poles on Elm Street in Northampton interfere with the scheduled removal of those poles and replacement with underground facilities. Fournier Affidavit, at ¶¶ 15-16.

33. At all times relevant hereto, MEC has fulfilled its obligations to Fibertech under the Agreement and pursuant to federal, state and local law.

COUNT I
(Injunctive Relief)

34. MEC repeats, realleges and reavers the allegations contained in paragraphs 1 through 33 as if fully set forth herein.

35. MEC will suffer irreparable harm if Fibertech is not preliminarily and permanently enjoined and restrained from further violations of the Agreement and applicable laws and regulations, and if Fibertech does not remedy its current violations of the Agreement and applicable laws and regulations.

36. Fibertech will not suffer irreparable harm if the requested preliminary and permanent injunctive relief is granted, as it simply requires Fibertech to honor its obligations under the Agreement and applicable laws and regulations.

37. There is a substantial likelihood that MEC will succeed on the merits of its claims and, therefore, preliminary and permanent injunctive relief is necessary and appropriate to prevent substantial irreparable harm to MEC and the public.

38. The public interest will be harmed if the requested relief is not granted.

COUNT II
(Declaratory Judgment)

39. MEC repeats, realleges and reavers the allegations contained in paragraphs 1 through 38 as if fully set forth herein.

40. An actual controversy exists between MEC and Fibertech as to whether Fibertech has breached and/or defaulted under Agreement.

41. MEC seeks a binding declaration that Fibertech has breached or otherwise defaulted under the terms of the Agreement.

COUNT III
(Declaratory Judgment)

42. MEC repeats, realleges and reavers the allegations contained in paragraphs 1 through 41 as if fully set forth herein.

43. An actual controversy exists between MEC and Fibertech as to whether MEC can properly terminate the Agreement with Fibertech.

44. MEC seeks a binding declaration that MEC properly terminated the Agreement due to Fibertech's breaches and/or default, and that MEC is entitled to remove or have Fibertech remove the unauthorized attachments at Fibertech's expense.

COUNT IV
(Breach of Contract)

45. MEC repeats, realleges and reavers the allegations contained in paragraphs 1 through 44 as if fully set forth herein.

46. The conduct of Fibertech as outlined above, including but not limited to Fibertech's installation of over 200 unauthorized attachments on MEC-owned poles, constitutes a breach of the Agreement.

47. Fibertech has failed and refused to correct its breaches of contract after timely notice thereof.

48. As a result of Fibertech's breaches of the Agreement, MEC has suffered damages and is entitled to all remedies provided for under the Agreement and/or common law, including the removal of the unauthorized attachments at Fibertech's expense.

COUNT V
(Violation of Mass. Gen. L. ch. 166 § 35)

49. MEC repeats, realleges and reavers the allegations contained in paragraphs 1 through 48 as if fully set forth herein.

50. Mass. Gen. L. ch. 166, § 35 prohibits, *inter alia*, a corporation from affixing structures or wire to the property of another without first obtaining the consent of the owner.

51. Fibertech has violated Mass.Gen. L. ch. 166, § 35 by placing attachments on MEC-owned poles without MEC's consent.

52. As a result of Fibertech's violation of Mass. Gen. L. ch. 166 § 35, MEC has suffered damages.

COUNT VI
(Trespass)

53. MEC repeats, realleges and reavers the allegations contained in paragraphs 1 through 52 as if fully set forth herein.

54. MEC is the sole owner or joint owner, and is in possession of, more than 200 poles located in Northampton, Massachusetts.

55. Fibertech, without lawful authority, has intentionally interfered with and trespassed upon MEC's possessory rights, and continues to commit trespasses thereon, by installing unauthorized attachments on MEC's solely and jointly owned poles.

56. As a result of Fibertech's continuing trespass, MEC has suffered and continues to suffer irreparable harm.

WHEREFORE, MEC prays that this Court:

1. Issue a short order of notice requiring Fibertech to show cause why Fibertech should not be (a) ordered to remove immediately any and all unauthorized attachments on poles owned solely or jointly by MEC, and (b) enjoined from installing any further unauthorized attachments on poles owned solely or jointly by MEC;

2. After notice and a hearing thereon, issue a preliminary injunction (a) enjoining and restraining Fibertech, together with its agents, servants, employees, contractors, and all others acting in concert with it or at its direction or behest from installing any further unauthorized attachments on poles owned solely or jointly by MEC; and (b) ordering Fibertech to remove immediately the unauthorized attachments to the 48 poles located on Route 66, Earle Street and Elm Street in Northampton referred to in paragraph 32 above; and (c) ordering Fibertech to remove immediately any and all other unauthorized attachments from any poles owned solely or jointly by MEC or, alternatively, tender \$125,000 in cash or its equivalent to MEC to pay for corrections of all conditions that MEC in its sole discretion determines to be hazards to the health, safety and welfare of its employees, its licensees, and the public;

3. After a trial on the merits, issue a permanent injunction enjoining and restraining Fibertech, together with its agents, servants, employees, contractors, and all others acting in concert with it or at its direction or behest from installing any further unauthorized attachments on poles owned solely or jointly by MEC;

4. Order and declare that MEC has properly terminated its Aerial License Agreement with Fibertech due to Fibertech's breach of contract and failure to cure such breach and, therefore, MEC is entitled to remove or have Fibertech remove the unauthorized attachments at Fibertech's expense;

5. Enter judgment against Fibertech on Counts I through VI of the Complaint; and assess damages against Fibertech on Counts IV and V in an amount to be determined;

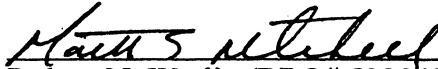
6. Award MEC its attorney's fees and costs incurred in connection with the prosecution of this matter; and

7. Order such other and further relief that this Court may deem proper, equitable and just.

THE PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS SO TRIABLE

MASSACHUSETTS ELECTRIC
COMPANY

By its attorneys,



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Dated: September 8, 2002

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPARTMENT
Civil Action No.

02 983

MASSACHUSETTS ELECTRIC COMPANY,)

Plaintiff,)

v.)

FIBERTECH NETWORKS, LLC, f/k/a)
FIBER SYSTEMS, LLC,)

Defendant.)

**APPLICATION OF MASSACHUSETTS ELECTRIC COMPANY
FOR PRELIMINARY INJUNCTION AGAINST FIBERTECH
NETWORKS, LLC, f/k/a FIBER SYSTEMS, LLC**

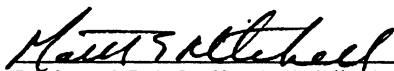
Pursuant to Mass. R. Civ. P. 65, the Plaintiff, Massachusetts Electric Company ("MEC"), hereby applies to this Court for a Preliminary Injunction against the Defendant, Fibertech Networks, LLC, f/k/a Fiber Systems, LLC ("Fibertech"), based upon the likelihood of success on the claims in its Complaint and the and the threat of irreparable harm to MEC and the public if the injunction is not ordered. In further support of this Application, the Plaintiff refers to the attached memorandum of law.

The Plaintiff requests preliminary injunctive relief (a) enjoining and restraining Fibertech, together with its agents, servants, employees, contractors, and all others acting in concert with it or at its direction or behest from installing any further unauthorized attachments on poles owned solely or jointly by MEC; (b) ordering Fibertech to remove

immediately the unauthorized attachments to the 48 poles located on Route 66, Earle Street and Elm Street in Northampton; and (c) ordering Fibertech to remove immediately any and all other unauthorized attachments from any poles owned solely or jointly by MEC or, alternatively, tender \$125,000 in cash or its equivalent to MEC to pay for corrections of all conditions that MEC in its sole discretion determines to be hazards to the health, safety and welfare of its employees, its licensees, and the public.

MASSACHUSETTS ELECTRIC
COMPANY,

By its attorneys,



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Dated: September 18, 2002